In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 73-1960

GENNARO J. ANGIULO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner contends that the district court erred in ordering a change of venue from the District of Massachusetts to the District of New Hampshire and in declining to change its decision after the application for transfer was withdrawn.

After a jury trial in the United States District Court for the District of Massachusetts, petitioner was convicted of assaulting an officer of the United States Coast Guard, in violation of 18 U.S.C. 111, and was sentenced to one year's imprisonment (the last nine months of which was ordered suspended in favor of two years' probation) and a fine of $2,000 (App. 6).[1] Prior to trial, defense motions for a change of venue had been denied (App. 1-4).

[1] "App." refers to the Appendix filed in the court of appeals.

The court of appeals reversed because of errors in a supplemental charge to the jury, 485 F. 2d 37, and ordered a retrial (App. 7). Petitioner then renewed his motion for a transfer (App. 59), asserting that "prejudicial saturation-type publicity from all media of communication in and about the New England States" warranted the "transfer [of] the trial of this indictment from the District of Massachusetts to some other less prejudicial district." The motion was accompanied by examples of newspaper articles printed in Boston; no publicity in other New England states was adduced. Following a hearing, the court ordered the case transferred to the District of New Hampshire for trial (App. 87). Petitioner was again convicted of assault, and was sentenced to imprisonment for thirty days and a fine of $2,000.

We rely upon the analysis of the court of appeals (497 F. 2d 440; Pet. App. 13-18).

1. Fed. R. Crim. P. 21(a) and the decisions interpreting it necessitate a two-stage analysis of defendant's motion for a change of venue on account of prejudical publicity. First, the motion is a waiver of the constitutional right to trial in the vicinage; once a defendant has stated that he is willing to accept trial elsewhere, he has surrendered his right under the Sixth Amendment and Article III, Section 2. Second, once this right has been surrendered the district court, so long as it does not abuse its discretion, is entitled to transfer the case for trial in any district in which the defendant can receive a fair trial. The defendant cannot select a specific district of transfer. *United States* v. *Marcello,* 280 F. Supp. 510, 520 (E.D. La.) (collecting cases), affirmed, 423 F. 2d 993 (C.A. 5), certiorari denied, 398 U.S. 959.

Petitioner does not question this rule, nor does he assert that he was tried in New Hampshire before a biased jury. Had the New Hampshire venire been prejudiced, the court below held, petitioner could have moved for a retransfer (497 F. 2d at 442; Pet. App. 18).

2. Petitioner nevertheless argues that he is entitled to different treatment because his motion sought not merely transfer from Massachusetts but transfer outside the "New England States." To transfer the case to New Hampshire, he argues, is equivalent to denying the motion made and therefore is in violation of Rule 21(a) because not made "upon the defendant's motion." The argument is not supported by the record. Petitioner moved for "transfer [of] the trial of this indictment from the District of Massachusetts to some other less prejudicial district" (App. 59; 497 F. 2d at 441; Pet. App. 13). As the court of appeals found, the motion on its face did not state that it was conditioned on transfer outside New England. Although counsel did note orally at the hearing on his motion that he sought transfer outside New England, this statement was apparently precatory rather than conditional. The court of appeals resolved against a reading of petitioner's motion as conditional (497 F. 2d at 441, n. 2; Pet. App. 14-15). That resolution is not clearly erroneous, and there is no occasion to review it here.

3. Petitioner finally argues that, however the motion is read, it was error for the district court not to allow his motion, made immediately after the court had transferred the case to New Hampshire, to withdraw the motion to transfer. Petitioner asserts that the decision below is at variance with those cases recognizing a general right to withdraw waivers of constitutional

rights. There is no conflict; the court below followed *Stevens* v. *Marks*, 383 U.S. 234, and *United States* v. *Marcello, supra,* 423 F. 2d at 1005, by expressly recognizing the right, under appropriate circumstances, to withdraw a waiver (497 F. 2d at 442; Pet. App. 16-17). However, the First Circuit, as had the Fifth Circuit in *Marcello*, ruled that the district court had not overstepped its discretion in refusing to allow withdrawal.

Two considerations support this outcome: (a) A motion to transfer is usually based upon prejudice in the original district. Although a defendant may seek to withdraw his waiver, the court has an obligation to satisfy itself that the trial in the original district will be fair. Thus the very reasons that would lead a court to grant defendant's motion under Rule 21(a) to transfer also militate against allowing him to withdraw unless he can point to a change in circumstances between the time when the motion is filed and the time when withdrawal is sought. (b) The timing of the motion to withdraw gave some indication that defendant's counsel may have been seeking "two bites of the apple" (497 F. 2d at 442; Pet. App. 17): *i.e.*, he was willing to accept the transferee district only if to his liking. In the interest of proper judicial administration, the court correctly declined to allow petitioner to make motions the results of which he could accept or abandon at his option. The situation plainly would have been different if extrinsic factors explained the decision to withdraw the motion for transfer. See *Marcello, supra*, 423 F. 2d at 1004.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

SEPTEMBER 1974.